No. 11137

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. J. REYNOLDS TOBACCO COMPANY,
A Corporation,

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,
both minors, by their Guardian ad litem, George H. Newby,

Appellees.

Brief of Appellants

On Appeal from the District Court of the United States for the District of Idaho, Eastern Division

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Residence: Boise, Idaho

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STATUTES AND TEXTS

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JURISDICTION

This action was commenced in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bear Lake, on September 29, 1942, by the filing of a complaint by George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, against R. J. Reynolds Tobacco Company, a corporation organized under the laws of North Carolina, and L. R. Donnelly and Rulon D. Hair, residents and citizens of the State of Utah, to recover $383.20 special damages, and $100,000.00 general damages,

and costs of suit, for alleged injury to, and death of, Avenell Newby, wife of George Newby and mother of the two minors (R.2-7).

October 26, 1942, upon petition of defendants, an order was made by the State District Court for removal of said cause to the United States District Court for the District of Idaho, Eastern Division (R.10-11), jurisdiction having been invoked under Sec. 24 of the Judicial Code as amended, 28 U.S.C.A. Sec. 41.

April 9, 1943, the trial court, over the objections of the defendants, granted plaintiff's motion to file an amended complaint (R.17-22), a portion of which was later stricken (R.26). July 15, 1943, defendants filed an answer to the amended complaint (R.27-33). The cause, first tried before the trial court with a jury, resulted in a verdict, returned October 23, 1943, against R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, for $7,500.00 (R.41), upon which, judgment was entered (R.41-42). The cause was appealed to the United States Circuit Court of Appeals for the Ninth Circuit by R. J. Reynolds Tobacco Company and L. R. Donnelly on January 20, 1944 (R.43). Rulon D. Hair did not appeal. The judgment was reversed and the cause remanded to the District Court with directions to grant a new trial (R.46-48; 145 Fed. 2d 760). The cause was again tried before the trial court with a jury and resulted in a verdict, returned March 23, 1945, against R. J. Reynolds Tobacco Company for $30,000.00 (R.67), upon which, judgment was entered (R.67-68). No verdict was rendered against L. R. Donnelly. Appellant R. J. Reynolds Tobacco Company

thereupon filed a petition on motion for judgment notwithstanding the verdict and, in the alternative a new trial, and motion for a new trial (R.69-96). The motion was denied (R.100-101).

Notice of appeal was filed by the appellant, R. J. Reynolds Tobacco Company, on June 13, 1945 (R.101), under Rules 73 and 74 of the Rules of Civil Procedure. Bonds on appeal and for supersedeas were thereupon filed and approved (R.102-104). The record on appeal was certified by the Clerk of the District Court on September 5, 1945, (R.534). The jurisdiction of this Court is invoked under Sec. 128 of the Judicial Code as amended, 28 U.S.C.A., Sec. 225 (a).

STATEMENT OF THE CASE

On September 11, 1942, and for several years prior thereto, Rulon D. Hair was and had been in the employ of appellant, R. J. Reynolds Tobacco Company, as a salesman. His immediate superior and district manager was L. R. Donnelly. He was furnished a panel truck for his use in the business of his employer, with direct instructions, both oral and in writing, never to use the truck for transporting a guest (R.251). During the evening of September 10, 1942, at Montpelier, Idaho, at the solicitation of Avenell Newby (R.385-388; 462-464), Hair transported Mrs. Newby in this truck from Montpelier to the "Aero Club," a night club about six miles east of Montpelier, where they danced and drank until about 2 or 3 o'clock a. m. of the following morning, September 11 (R.391). They then left the Aero Club and drove back to Montpelier. Mrs. Newby did not want to go home but urged

Hair to take her to Soda Springs, a distance of about 30 miles (R.398), to visit another night club (R.391-393). Hair yielded, and they arrived at Soda Springs about 4:30 or 5 o'clock a. m. (R.394). The club was closed. They thereupon went to the Enders Hotel in Soda Springs, obtained a room, and occupied it together until about noon of September 11 (R.372-4; 394-5; 416; 453, 456). They then went to the Oasis Club in Soda Springs, where they remained until about 2:30 o'clock p. m. of said day (R.397). At this place Mrs. Newby again drank some intoxicating liquor (R. 397). They then drove to Grace, Idaho, where Hair intended to see an acquaintance and get him to advise his wife at Pocatello, Idaho, that he would be later than usual getting home (R.397). Then they travelled toward Montpelier, Idaho, for the express purpose of taking Mrs. Newby home (R.398). On the way home to Montpelier, on highway No. 30 North, the car seemingly went out of control and tipped over (R.399-402). Mrs. Newby was seriously injured and died a few days later.

Mr. Hair and Mrs. Newby were together on a party of their own for a period of about 18 hours and up until the time of the accident, during which time Hair admitted that he was doing no business whatever for his employer (R.398, 411-412). There is no evidence whatever, aside from presumptions, all of which appellant contends were overcome, that Hair was acting within the scope of his employment. Avenell Newby was, during all of the time she was in the panel truck, a gratuitous guest of Hair. Hair knew that he had no right to use the truck for this purpose and was violating the positive instructions of his employer and would be

discharged if appellant or Mr. Donnelly should find this out (R.382, 384, 390, 412). During these 18 hours the two of them were eating, drinking, dancing, staying in a hotel room from 6 to 7 hours at Soda Springs, and using the panel truck wholly and entirely for their own pleasure.

Following the death of Avenell Newby, appellees instituted suit against appellant, R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, and by their Amended Complaint, filed after removal of the case to the United States District Court, charged that Hair at the time of the accident was acting within the scope of his employment; further alleged that Hair was permitted to operate the truck notwithstanding that appellant, R. J. Reynolds Tobacco Company, and L. R. Donnelly, knew that he "was a careless, reckless, and negligent driver of an automobile, and was in the habit of hauling guests contrary to instructions," and further, that Hair so recklessly drove and operated the truck that it ran off the highway, tipped over, and inflicted injuries to Avenell Newby, a guest of Hair and defendants, from the effects of which her death occured, and claimed damages against the defendants. Such Amended Complaint was further amended during the third day of the second trial, substituting the word "drunken" in place of the word "incompetent," over appellant's objection (R.316-317). In their Answer to the Amended Complaint, defendants denied that at the time of said accident Hair was acting within the course or scope of his employment, alleging that he was entirely on a party of his own and acting contrary to instructions; denied that Hair was a careless, reckless, or incompetent driver of an automobile

or that he had hauled guests therein with the knowledge of defendants; affirmatively alleged contributory negligence on the part of Avenell Newby and that she, as a gratuitous guest of Rulon D. Hair, fully and freely acquiesced in everything done by him in the driving of said truck and therefore assumed all risks attendant to the trip and, that the injuries which she may have sustained, and damages, if any, thereby suffered by the appellees, were the result of matters over which the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, had no control (R. 27-33).

The first trial resulted in a verdict and judgment against R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, for $7,500 and costs (R.41-42). R. J. Reynolds Tobacco Company and L. R. Donnelly appealed from said judgment. Rulon D. Hair did not appeal, nor did appellees appeal from the judgment against Hair. The judgment was reversed by the appellate court as to R. J. Reynolds Tobacco Company and L. R. Donnelly (145 F. 2d 768). The judgment thereupon became final as to Rulon D. Hair.

Appellees sought recovery at the second trial against appellant and defendant L. R. Donnelly (R.110-113). At this trial, and over objections of appellant and defendant L. R. Donnelly on the ground of immateriality and irrelevancy and in nowise tending to prove the status of Hair as an incompetent driver nor a waiver on the part of appellant and L. R. Donnelly of its injunction to Hair not to haul guests, the court permitted proof of an accident in which Hair was involved in Pocatello, Idaho about 3½ years prior to the accident involved in this case (R.220-233; 265-287; 310-314; 345-

351; 354-357). Further, over objections of the defendants on the grounds of immateriality and irrelevancy, the trial court permitted testimony of Hair's hauling guests on some three or four occasions during approximately four years, without any showing at all that either of such defendants had any knowledge whatever of such occurrences (R.329). The trial court further permitted various witnesses, over objections of the defendants, to give their opinion as to the reputation of Hair as a careless and incompetent driver, and refused to strike such evidence upon motion of the defendants after said witnesses had admitted on cross-examination that their conclusions were based upon specific incidents and purported information within the knowledge solely of police officers (R.318-341). Various other items of evidence were introduced over objections of the defendants, to which reference will be made in argument.

At the conclusion of the evidence, appellant and defendant Donnelly moved for a directed verdict upon the allegations contained in paragraph VII of the Amended Complaint charging that Hair was a careless and reckless driver and known to be such to his employer and was in the habit of hauling guests contrary to instructions and also moved for a directed verdict upon the entire Complaint, upon the ground that the evidence was insufficient to support a verdict (R.488-492). The defendants also moved the court to compel plaintiffs to elect upon which of the two theories outlined in their Amended Complaint they would rely for recovery (R.360). All of said motions were denied. Prior to the close of the evidence, the defendants made requests for various instructions to the jury,

among which were instructions to the effect that by reason of the fact that liability, if any, against said defendants was derivative from the servant, Hair, and, that judgment against Hair had become final and no appeal had been taken therefrom by appellees, that the jury could in no event, return a verdict in excess of $7,500. The trial court failed to so instruct the jury and exceptions were duly taken. Certain instructions requested and refused will be hereafter referred to. Various exceptions were also taken to instructions given to the jury (R. 507-517). The jury returned a verdict in favor of the plaintiffs and against R. J. Reynolds Company for $30,000. No verdict was returned against the defendant L. R. Donnelly. Appellant took exception to the reception of the verdict (R. 66-67).

After entry of judgment, appellant moved for judgment notwithstanding the verdict, and in the alternative, for a new trial (R.69-96). These motions were predicated upon the insufficiency of evidence to justify the verdict and various errors at law occurring at the time of the trial, excessiveness of the verdict due to the influence of passion and prejudice aroused by the uniform of the sailor, and copious newspaper articles in the possession of and read by members of the jury, tending to inflame and distort the judgment of the jurors (R.76, 89-96). These motions were denied (R.100-101).

Appellant's position on this appeal is that it is not liable for the conduct of Rulon D. Hair at and for a time prior to the accident involved in this case; that no liability of appellant existed in favor of Avenell Newby or appellees; that if appellant is liable such liability cannot exceed $7500.00; that

the trial court erred in its ruling touching various items of evidence, in giving various instructions to which objections were made, and in refusing to give certain requested instructions, its denial of appellant's motion for a directed verdict, and for judgment notwithstanding the verdict and, in the alternative, for a new trial, all of which, including the manner in which the various points are raised, will be hereafter more fully explained.

QUESTIONS PRESENTED

1. Whether or not the court should have compelled the payment of costs on the appeal, prior to proceeding with the second trial. This question arose on motion.

2. Whether or not this case should have been submitted to the jury on two theories, i. e., claimed negligence of the employer in employing an alleged reckless driver and, claimed violation of the guest statute. These questions were raised by objection to introduction of evidence, motion to strike from amended complaint, motion to compel plaintiffs to elect and objections to instructions to the jury.

3. Whether or not the court erred in admitting in evidence, over objections of appellant, various statements of witnesses, in an attempt to prove Rulon D. Hair was a reckless, careless and drunken driver and carried a guest contrary to instructions, when such testimony dealt entirely with one incident. These questions were raised by objections to the evidence and motions to strike.

4. Whether or not direct testimony of a witness, shown

to be incompetent on cross-examination, should be stricken on motion.

5. Whether or not the court erred in admitting in evidence details of the Myers incident and the record of conviction of Rulon D. Hair. These questions were raised by objections to the evidence and motions to strike.

6. Whether or not, in a case controlled by the guest statute of Idaho, the court can properly instruct the jury on simple negligence. This question arose on objection to instructions.

7. Whether the evidence as a whole can support the verdict. This question was raised by motion for directed verdict and motion for judgment notwithstanding the verdict and in the alternative for a new trial.

8. Whether or not an alleged employer can be held in damages for an amount greater than that which was rendered against an employee, where such judgment against the employee became final, and the alleged liability of the employer is derivative. This question was presented on objection to instructions and refusal to give other instructions to the jury.

9. Whether or not a new trial should have been granted in this case.

SPECIFICATIONS OF ERROR

I.

The court erred in denying appellant's motion for a stay of trial of this cause until appellees had paid costs which had been awarded against them on the prior appeal (R.48-49, 60).

II.

The court erred in denying appellant's motion to strike that portion of Paragraph VII of the Amended Complaint as follows:

> "Notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions" (R.25-26).

also in permitting said allegation to be amended by substituting the word "drunken" for the word "incompetent" (R. 316-317); and in denying or failing to rule upon appellant's motion to compel appellees to elect upon which of the two theories advanced in the Amended Complaint they would rely for judgment, that is to say, "whether they will rely upon the theory that Hair was acting within the scope of his employment when driving Avenell Newby as a guest or whether they will attempt to rely upon the theory that Hair was an incompetent, drunken and reckless driver and known as such to these defendants" (R.360).

III.

The court erred in permitting appellees to read in evidence the cross-examination on deposition of E. A. Darr, prior to the time any direct testimony of Mr. Darr had been introduced, to which appellant objected "upon the ground that it is immature and * * * that the cross-examination of a witness whose direct examination is not before the jury is confusing and is improper in the presentation of the matter to the jury,

particularly where the original testimony has not been produced" (R.213-214).

IV.

The court erred in permitting appellees to read in evidence from the cross-examination on deposition of E. A. Darr, the following question, and requiring his answer thereto: "You did know, Mr. Darr, that Rulon D. Hair was involved in an accident with the R. J. Reynolds Tobacco Company truck on or about April 11, 1939, in which a man named Myers was killed?", to which appellant objected upon the grounds that the same was "incompetent, irrelevant, and immaterial. No foundation has been laid of character, * * * it is prejudicial to the rights of the defendants in this case" (R.220).

V.

The court erred in permitting appellees to read in evidence from the said cross-examination of E. A. Darr, the following question and requiring his answer thereto: "I believe a suit was brought against the R. J. Reynolds Tobacco Company with the same defendants in that particular case as are the defendants in this case?", to which appellant objected upon the grounds that it was "immaterial and incompetent, * * * not connected with any matter on direct examination, * * * prejudicial to the rights of the defendants" (R.221).

VI.

The court erred in permitting appellees to read in evidence from said cross-examination of E. A. Darr, the following question, and requiring his answer thereto: "Have you a record of the pleadings or the papers that were served on

the R. J. Reynolds Tobacco Company in that suit?", to which appellant interposed "the same objections" as to the preceding question (R.221).

VII.

The court erred in permitting appellees to read in evidence from said cross-examination of E. A. Darr, the following question and requiring his answer thereto: "You do not have a copy of the court pleading in that case?", to which appellant objected upon the grounds that it was "immaterial and incompetent, * * * not connected with any matter on direct examination, * * * prejudicial to the rights of the defendants" (R. 221).

VIII.

The court erred in denying appellant's motion to strike the answer to the preceding question, made upon the ground "that it is incompetent, irrelevant and immaterial and prejudicial" (R.222).

IX.

The court erred in permitting appellees to read in evidence from said cross-examination of E. A. Darr, the following question, and requiring his answer thereto: "Was that complaint served on the R. J. Reynolds Tobacco Company?", to which appellant objected "on grounds as made to the former question and that it deals with matters foreign to this suit * * *" (R.222).

X.

The court erred in permitting the appellees to read in evidence from said cross-examination of E. A. Darr, the fol-

lowing question, and requiring his answer thereto: "Mr. Darr, when did you receive a report as to the accident in April, 1939? April 11, 1939?", to which appellant objected "on the same grounds as heretofore stated" (R.222).

XI.

The court erred in permitting appellees to read in evidence from said cross-examination of E. A. Darr, the following question, and requiring his answer thereto: "Did you have an investigation made of that accident which resulted in the death of Mr. Myers?", to which appellant objected upon the grounds, "incompetent, irrelevant and immaterial * * * in addition to the previous objection stated" (R.223).

XII.

The court erred in permitting appellees to introduce in evidence on said cross-examination of E. A. Darr, appellees' Exhibit B, the same being a letter to Mr. Chas. C. Roe written by L. R. Donnelly, over objection of appellant "as incompetent, irrelevant and immaterial, prejudicial and not having to do with the issues or parties here" (R.224-226); also erred in denying appellant's motion to strike said Exhibit B, made upon the grounds, "there isn't a word in that letter that could be interpreted as having to do with this so-called waiver of instruction. It has to do entirely with the incident (Myers) that we have heretofore called to Your Honor's attention and it is wholly incompetent, irrelevant and immaterial" (R. 227).

XIII.

The court erred in permitting appellees to introduce in evidence on said cross-examination of E. A. Darr, over ob-

jection of appellant made upon the grounds that the same were "incompetent, irrelevant, immaterial and prejudicial," appellees' Exhibits C, a telegram to appellant from L. R. Donnelly; D, a letter to appellant from Chas. C. Roe; E, a letter to appellant from Chas. C. Roe; F, a telegram to appellant from Chas. C. Roe, and G, a telegram to Chas. C. Roe from appellant; also erred in denying appellant's motions to strike said exhibits, made upon the same grounds as urged against said Exhibit B (R.227-232).

XIV.

The court erred in permitting appellees to read in evidence from said cross-examination of E. A. Darr, the following question, and requiring his answer thereto: "Mr. L. R. Donnelly attended the preliminary trial in which Hair was indicted for manslaughter, didn't he?", to which appellant objected "as incompetent, irrelevant and immaterial and has no bearing on any issue in this case. It is prejudicial and not proper cross-examination" (R.233).

XV.

The court erred in permitting appellees to interrogate the witness E. A. Darr generally on various matters dealing with the Myers accident, to which, in each instance, appellant objected upon the grounds that the same was immaterial, irrelevant, and prejudicial (R.218-234).

XVI.

The court erred in permitting appellees to call L. R. Donnelly and interrogate him under cross-examination on matters dealing with the Myers accident, referred to in the cross-exam-

ination of E. A. Darr, over the objection of the appellant that the same was "incompetent, irrelevant and immaterial" (R. 264-266).

XVII.

The court erred in permitting appellees to interrogate L. R. Donnelly, under such cross-examination, touching a purported newspaper article claimed by appellees to have been published in the Pocatello Tribune and purportedly dealing with the Myers accident (R.265-266; 269-275), to which appellant objected upon the grounds that it was "incompetent, irrelevant and immaterial, * * * and prejudicial," and which objections were repeatedly made and overruled (R. 265-266; 269-275).

XVIII.

The court erred in permitting the witness L. R. Donnelly, under such cross-examination, to answer the following question propounded by appellees: "In the clipping that you sent did it contain a statement the same as the article you read here where the police claimed that this man was driving while intoxicated and that he was held on a drunken driving charge and that he was going to be arrested for manslaughter?", to which appellant objected upon the grounds, "as incompetent, irrelevant and immaterial and not the best evidence" (R.274).

XIX.

The court erred in permitting L. R. Donnelly, under such cross-examination, to answer the following question propounded by appellees: "You attended the trial in the District Court where Mr. Hair was tried under the indictment?", to

which appellant objected upon the grounds "as incompetent, irrelevant and immaterial * * * prejudicial" (R.275).

XX.

The court erred in permitting L. R. Donnelly, under such cross-examination, to answer the following question propounded by appellees: "You heard Mr. Pugmire testify that Mr. Hair was under the influence of intoxicating liquor and had been drinking when he struck Mr. Myers, didn't you?", to which the appellant objected "as incompetent, irrelevant and immaterial and not the best evidence * * * prejudicial." (R.276).

XXI.

The trial court erred in permitting L. R. Donnelly, under such cross-examination, to answer various and additional similar questions, propounded by appellees, touching the Myers incident, over appellant's objections that the same were immaterial, irrelevant, incompetent and prejudicial (R.276-282; 285-287).

XXII.

The court erred in permitting the witness Pugmire to answer various questions propounded by appellees touching the circumstances of the Myers accident, as detailed at R. 310-313, over appellant's repeated objections that the same were "incompetent, irrelevant and immaterial for any purpose."

XXIII.

The court erred in permitting the witness Pugmire to answer the following questions propounded by appellees: "Now, Mr. Pugmire, I will ask you, did you know the gen-

eral reputation of Rulon D. Hair in the community in which he lived during 1939, 1940 and 1941 for being a drunken, reckless driver or a sober, careful driver?", to which appellant made objection, "as being incompetent, irrelevant and immaterial and not having a proper foundation laid (R.314-315), to which question the answer appears at the top of R. 319.

XXIV.

The court erred in denying appellant's motion to strike the testimony of Mr. Pugmire touching the general reputation of Mr. Hair as a drunken, reckless, negligent, or incompetent driver, upon the ground that, as shown by cross-examination, the same was based upon three incidents, one of which was the Myers incident, one was the so-called Dubois incident, and the remaining one was the incident involved in the case being tried; that such incidents did not purport to give general reputation; that Pugmire's testimony was based upon reports that he had heard from police officers and not from the general public. (See objection, R. 327; testimony, 321-324; ruling, 491.)

XXV.

The court erred in permitting the witness Sid Close to answer the following question propounded by appellees: "What was that general reputation in your community as to whether or not he was a drunken, reckless driver or a sober, careful driver? Answer good or bad.", referring to Rulon D. Hair, to which appellant objected upon the grounds that it was "incompetent, irelevant, and immaterial, * * * no proper foundation is laid, * * * and does not prove * * * any allegation of the complaint"; also erred in denying ap-

pellant's motion to strike the answer of said witness, made after cross-examination of him, upon the grounds that the same was "incompetent, irrelevant and immaterial" (R.328-335).

XXVI

The court erred in permitting the witness Buskirk to answer the following question propounded by appellees: "Mr. Buskirk, do you know the general reputation in your community of Mr. Hair, confining your answer to 1939, 1940 and 1941, in this community for being a drunken, reckless or sober and careful driver? Do you know that reputation?", to which objection was made upon the grounds, "as incompetent, irrelevant and immaterial and no proper foundation laid, * * * bad in form. No proof that any such information, if it existed, ever came to the defendants' knowledge"; also erred in denying appellant's motion to strike said answer made after cross-examination of said witness, made upon the same grounds and upon the further grounds that the answer was "not based on the general reputation in the community" (R.337, 441).

XXVII.

The court erred in permitting the witness F. M. Williams to testify concerning the general reputation of Avenell Newby as to her moral character, and that such reputation was good in the community in which she lived, over appellant's objection that the same was "incompetent, irrelevant and immaterial, and no proper foundation has been laid" (R.486); also erred in denying appellant's motion to strike said testimony after cross-examination, made upon the ground, "that there is no foundation * * * upon which any conclusion given

by the witness could be predicated" (R.487; ruling of court, 491).

XXVIII.

The court erred in admitting in evidence portions of plaintiff's Exhibit A, being part of the deposition of E. A. Darr, the same being a portion of a civil complaint filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, by Bertha Myers et al, against R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, following the Myers accident (R. 354-55, 357), over appellant's objection that the same was "incompetent, irrelevant and immaterial, and does not prove or tend to prove any issue in this case. We have spent more time trying the Myers case than the case at bar, * * * and prejudicial" (R.345, 346).

XXIX.

The court erred in admitting in evidence plaintiff's Exhibit No. 24 (R.348-351), being the prosecuting attorney's information and verdict of the jury, in the case of State of Idaho v. Rulon D. Hair, in Bannock County, Idaho, the same having to do with the Myers accident, over the objection of the appellant, that it was "incompetent, immaterial and irrelevant," (R.344) and that it is "not sufficient to establish or prove or brand this man as an incompetent driver. There is no foundation laid and it would be prejudicial." (R.347).

XXX.

The court erred in failing to grant appellant's motion for a directed verdict, made upon grounds that the evidence is

insufficient in law to justify the submission of the cause to the jury, more particularly as follows, to wit (R.488-490, 492):

1. Insufficiency of the evidence to show that Rulon D. Hair was acting within the scope of his employment at the time of the accident, the evidence showing without conflict that at said time Hair was entirely upon a pleasure party of his own, and was transporting Avenell Newby with him as a guest to her home in Montpelier, Idaho.

2. The evidence conclusively shows that Avenell Newby was riding in said automobile as a guest of Rulon D. Hair, and that Hair had no authority from appellant or defendant Donnelly to haul guests in said car, but had positive oral and written instructions not to haul guests in said car, other than an employee or officer of the company; that the automobile was used in violation of such instructions; that the evidence is wholly and completely insufficient in law to show any waiver of these instructions on the part of either defendant Donnelly or appellant R. J. Reynolds Tobacco Company.

3. The evidence fails to show that at the time of said accident Rulon D. Hair was violating the guest statute of the State of Idaho or that he was guilty of reckless disregard of the rights of Avenell Newby, or of violation of any other of the requirements stated in said statute, providing for recovery of the guest suffering damage, and that he was not guilty of any such negligence required by the guest statute at the time of said accident.

4. The evidence fails to show that Rulon D. Hair was a careless, reckless, drunken or incompetent driver, or that he

was habitually negligent; that the one accident which may have occurred in Pocatello, Idaho, in 1939 is wholly and completely insufficient as a matter of law to establish his status of incompetency as a driver.

XXXI.

The court erred in denying defendants' motion for a directed verdict upon the question raised by appellees' paragraph numbered 7 of the Amended Complaint, wherein it was charged that Rulon D. Hair was permitted to use the truck of the defendants when it was alleged they knew him to be a careless, reckless, drunken and incompetent driver, upon the ground and for the reason that the evidence is wholly and completely insufficient to show, as a matter of law, that there was any incompetence or negligence shown in his use of automobiles as an habitual matter, and that said allegations are in no wise supported by the evidence, or that any such information, if any did exist, ever came to the attention of the defendants, and that said matters be removed from the jury by proper instructions and that the evidence attempting to bear thereon be stricken from the record; that said motion was made for consideration of the court in the event the motion for a directed verdict of the whole cause be denied (R.490-92).

XXXII.

The court erred in submitting this case to the jury without limiting the jury to a maximum recovery against said defendants of the amount theretofore rendered against Rulon D. Hair, and which became final judgment against the agent or employee, to wit, $7,500 (R.110-12, 492-506).

XXXIII.

The court erred in denying appellant's motion for judgment notwithstanding the verdict, and in the alternative for a new trial, made upon the grounds of the insufficiency of the evidence, errors at law occurring at the trial, including the court's rulings on evidence, the instructions of the court given to the jury, to which exceptions were taken, and failure to give other instructions requested by appellant, all of which appear at length in said motion, and particularly in failing to instruct the jury that judgment of $7,500 having been theretofore awarded against Rulon D. Hair, that the jury could not in any event return a verdict against the defendants in excess of said sum; misconduct of the jury and excessive damages appearing to have been given under the influence of passion or prejudice; all of which appears in full and at length in said motion (R.69-99; see court's ruling thereon R.100-101).

XXXIV.

The evidence is insufficient to justify the verdict and judgment thereon against this appellant, and is against the law, more particularly as follows:

(a) The evidence fails to show, at the time of the accident, that Rulon D. Hair was acting as an agent, servant, or employee of the appellant, or of L. R. Donnelly, but, on the contrary, it conclusively shows that he was not acting within the scope of his employment, but was engaged with Avenell Newby on a pleasure party of their own.

(b) The evidence is undisputed that, at the time of the accident, Avenell Newby was a gratuitous guest of Rulon D.

Hair, being transported by him contrary to positive written and oral instructions from the appellant, forbidding the hauling of guests, and the evidence is insufficient in law to prove a waiver of such instructions.

(c) That the Myers incident referred to in the testimony is the only incident of which the appellant had any knowledge that Hair had ever been involved in any accident, and that such evidence is wholly insufficient as a matter of law to prove Hair a reckless or incompetent driver on September 11, 1942. and that the submission of said issue to the jury was wholly without substantial evidence for its support; on the contrary, the evidence shows a high degree of competency and skill on the part of Hair, in the use of appellant's automobile.

(d) That the evidence relating to the Myers incident is wholly insufficient, as a matter of law, to show, prove or tend to prove any waiver or abrogation whatsoever of appellant's positive injunction to Hair, both oral and in writing, not to haul guests in said automobile.

(e) That the evidence relating to the Myers incident, which occurred over 3½ years before the Newby accident involved in this case, knowledge of which was brought to appellant's attention, and three or four other isolated instances of Hair's transporting guests, knowledge of which, the evidence shows, did not come to appellant's or defendant Donnelly's attention, is wholly insufficient to show an abrogation of appellant's positive instruction to Hair not to transport guests.

(f) The evidence is conclusive that Avenell Newby was a gratuitous guest of Rulon D. Hair, but fails to show that,

at the time of the accident, Hair was guilty of reckless disregard of her rights or otherwise violated the guest statute.

(g) The evidence is without dispute that, at the time of the accident, Avenell Newby was riding with Hair at her solicitation and request and that the two were engaged in a joint venture in which she assumed all risks incident upon said trip, and that she at all times was conscious and could observe Hair's conduct, and that she made no protest, but acquiesced therein, and she thereby became, and her heirs are now, estopped as a matter of law from asserting liability for damages.

XXXV.

The court ered in giving to the jury that certain instruction as follows:

> "You are instructed that if you believe that R. D. Hair, who has been mentioned many times during the trial of this case as the driver of the truck, was a careless, reckless, drunken, incompetent driver, and that the defendants R. J. Reynolds Tobacco Company, and L. R. Donnelly knew, or by the use of reasonable diligence could have known that he was a careless, reckles and incompetent driver, or that he was acting as the agent, servant or employee of the R. J. Reynolds Tobacco Company or L. R. Donnelly, within the course and scope of his employment as these terms are defined for you in these instructions, then you would be justified in finding against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly." (R.495),

to which appellant took exception upon the grounds "that the same deals with an issue upon which there is no competent

or sufficient evidence justifying the submission of the said matter to the jury" (R.509).

XXXVI.

The court erred in giving to the jury that certain instruction as follows:

> "You are instructed that the plaintiffs have alleged that the defendants were negligent in permitting Rulon D. Hair to use said automobile knowing him to be a reckless, drunken and incompetent driver. Before you can consider this charge against the said defendants it would be necessary for you to find from a preponderance of the evidence, first; that Rulon D. Hair was a careless, reckless, drunken and incompetent driver on the date of the accident, and, secondly; that such facts were known to the defendants, and before such matter can be considered by you it would be necessary for you to find that a reasonably prudent man, knowing the facts as shown by the evidence would reasonably conclude that he was of such character. In order that prior specific acts of negligence by a servant, agent, or employee should be sufficient to establish the master's negligence in retaining the servant in his employ, the action must be the result of such incompetence of such a character rendering the servant unfit to be retained in his position, and even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless, drunken and incompetent driver, yet, if such was not known, or by reasonable diligence could not have been known to the defendants they could not, nor either of them be held negligent in employing Rulon D. Hair or keeping him in their employment." (R.496-497),

to which appellant took exception upon the grounds "that the same deals with an issue upon which there is no competent

or sufficient evidence justifying the submission of the said matter to the jury" (R.509).

XXXVII.

The court erred in giving to the jury that certain instruction as follows:

> "You are further instructed, that Rulon D. Hair cannot be charged with a reputation of drunken and reckless driving an automobile, unless you find that such a reputation was generally known among the populace of the community in which he lived and worked, in addition to the opinion in that regard of a relatively small class of persons, and that the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly cannot be charged with having known any such reputation of Hair unless it be shown that any such reputation was known to the defendants or either of them, or that Hair's acts of drunken or reckless driving, if any, were so flagrant, and committed so frequently and publicly that the defendants in the exercise of reasonable diligence should have known of any such reputation of Rulon D. Hair; further an opinion of a small group of persons, if you believe such opinion existed, cannot be reasonably expected to give notice of such fact to an ordinary business man, nor be sufficient to create a reputation." (R.499-500),

to which appellant took exception upon the grounds "that the same deals with an issue upon which there is no competent or sufficient evidence justifying the submission of the said mater to the jury" (R.509).

XXXVIII.

The court erred in giving to the jury that certain instruction as follows:

"The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that statute it is provided that it shall be prima facie lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State statute that it shall be prima facie unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities." (R. 497),

to which appellant took exception upon the grounds that said instruction "is based upon a statute covering ordinary negligence in which automobiles are involved and does not have application in the instant case or to any case where the guest statute is involved and that the said instruction would tend to mislead and confuse the jury into considering a case in which this law is involved rather than cases involving the guest statute" (R.510).

XXXIX.

The court erred in giving to the jury that portion of a certain instruction as follows:

"The amount of damages, if any, which you allow

> shall in no event exceed the amount prayed for in the plaintiffs' complaint" (R.504).

to which appellants took exception upon the grounds "that the plaintiffs in this case should not be allowed to recover more than $7500, the same being the amount heretofore awarded against R. D. Hair as the agent, servant and employee of said defendant and that the jury should be so instructed with their instruction on damages" (R.511-512).

XL

The court erred in failing to give to the jury appellant's requested instruction No. 11, as follows:

> "You are instructed that in respect to the issue as to damages, if you come to consider that issue, the court charges you as a matter of law, that in no event in this case can you award damages against the defendants in excess of the sum of $7500."

appellant's exception being: "For the reason that this case has heretofore been tried before a jury as against these defendants and R. D. Hair as agent, servant and employee of said defendants with a joint verdict having been rendered of $7500 from which judgment the defendants Tobacco Company and Donnelly appealed to the Circuit Court of Appeals, and R. D. Hair did not appeal, and that said Circuit Court of Appeals reversed the judgment as to the defendants Tobacco Company and Donnelly and remanded the matter for a new trial and a new trial has been had against the last named defendants and that the amount heretofore awarded against the said R. D. Hair servant, agent, and employee of the Reynolds Tobacco Company and Donnelly fixes the max-

imum amount for which any judgment could be rendered in this case" (R.512).

XLI.

The court erred in failing to give to the jury appellant's requested instruction No. 12, as follows:

> "You are instructed that this cause has heretofore been tried and a verdict rendered against all of said defendants in the sum of $7500. R. J. Reynolds Tobacco Company and L. R. Donnelly appealed said cause to the appellate court. Rulon D. Hair did not appeal. Said judgment was reversed as to R. J. Reynolds Tobacco Company and L. R. Donnelly and the cause was remanded for a new trial as against them. The Judgment against Rulon D. Hair was not appealed from either by him or by the plaintiffs. It therefore is final so far as Rulon D. Hair is concerned, and you are to decide this case upon the issues of whether or not R. J. Reynolds Tobacco Company and L. R. Donnelly are also responsible. In this respect, you are specifically charged that the judgment against the defendant, Hair, should not in any sense be taken by you as any evidence of any liability on the part of the Tobacco Company or L. R. Donnelly, but that you must decide the case, so far as liability may be concerned, or the lack of it, as though no previous judgment had been rendered. In this respect, however, you are definitely charged that in the event you should find against these defendants and determine to assess damages, you can not render a verdict in excess of $7500. This does not mean that the verdict, if you find against said defendant, should reach said sum, but that you are authorized, if you find the plaintiffs entitled to recover against the Tobacco Company and L. R. Donnelly, to fix the amount in such sum as you may find said plaintiffs have been damaged by the acts of R. J. Reynolds Tobacco Company and L. R. Donnelly, not exceeding, however, the sum of $7500,"

appellant's exception being "upon the same grounds and for the same reasons as set out in the objection and exception to the refusal to give instruction number 11" (R.512-514). See specification No. XL.

XLII.

The court erred in failing to give the jury appellant's requested instruction No. 18, as follows:

> "You are instructed that where a gratuitous guest, riding in an automobile being driven by another, fails to protest against the driver's proceeding at an excessive speed, such conduct constitutes contributory negligence as to preclude recovery for injuries and damages occasioned by such excessive speed,"

appellant's exception being "upon the grounds and for the reason that the law of the State of Idaho is to the effect that the guest in the automobile is under the necessity of protesting and the failure to protest against the excessive speed, the conduct contributing to the accident, when such guest has an opportunity to do so, and this should preclude the recovery for injuries and damages by such conduct of the said guest" (R. 514).

XLIII.

The court erred in failing to give to the jury appellant's requested instruction No. 22, as follows:

> "You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair had been drinking intoxicating liquor, and that the said Avenel Newby joined with him and also drank intoxicating liquor, and that the two of them were riding in said automobile while under the influence of intoxicating liquor, then and in that event you are

> instructed that the said Avenel Newby assumed the risk of any danger or damage that might result from the use of intoxicating liquor and was contributorily negligent in her conduct, and under such circumstances, the plaintiffs cannot recover in this case,"

Appellant's exception being: "for the reason that the law of Idaho is to the effect if a guest participates and joins with the driver of an automobile in imbibing intoxicating liquor, the guest is equally liable with the driver and is contributorily negligent and assumes the risk of riding in said automobile and there is sufficient evidence in this case to require the giving of such instruction." (R.516-517).

XLIV.

The court abused its discretion in denying appellant's motion for a new trial, made upon the grounds therein recited including excessive damages given under the influence of passion or prejudice (R.69-96).

ARGUMENT

In the argument to follow, the specifications of error will be grouped and presented under headings designed to indicate the contentions of the appellant. The order of the points presented will follow, generally, the specifications. To avoid repetition, reference will be made to various errors without quoting them.

I.

PAYMENT OF COSTS PRIOR TO SECOND TRIAL WAS MANDATORY

(ERROR I)

At the conclusion of the first appeal the Circuit Court, pursuant to its mandate, adjudged that appellants recover against appellees their csts expended, taxed in the sum of $704.12, and have execution therefor (R.46-49). Appellant and L. R. Donnelly moved the trial court for an order staying all further proceedings until the costs taxed were paid (R.48-49), which motion the court denied. Appellant, by its specification of error Na. 1, assigned as error the refusal of the trial court to obey the mandate of the Circuit Court. The following quotation, taken from the case of Bankers Securities Corp. v. Ritz Carlton R. & H. Co., (C.C.A.3d) 99 F. 2d 51, clearly illustrates the trial court's error:

> "Our mandate in the case at bar directed that the appellants recover against the appellee $341.60 'for their costs herein expended and have execution therefor.' That meant that if they were not paid as and when costs are usually paid, execution might issue therefor. It did not mean that another suit between the same parties on the same cause of action might be started and costs in the first suit might be paid by

> someone at some time at or after the conclusion of the second suit. It was not within the discretion of the District Judge thus in effect to set aside the mandate of this court in this regard. The direction of the Circuit Court of Appeals took the case out of the discretion of the District Court and made the payment compulsory."

See, also, Weidenfeld v. Pacific Improvement Co., (C.C.A. 2d) 101 F. 2d 699.

II.

MOTION TO STRIKE AND MOTION TO ELECT

(ERROR II)

After appellees were permitted to file their amended complaint, defendants moved to strike therefrom the following:

> "Notwithstanding that all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile, and was in the habit of hauling guests contrary to instructions)) (R.25).

The court denied such motion (R.26). During the second trial appellees were permitted, over objections of appellant, to amend this clause by substituting the word "drunken" for the word "incompetent" (R.316-317).

It will be observed that Hair was not charged in the amended complaint with drunkenness at the time of the accident (R.21). The allegation, "the habit of hauling guests contrary to instructions," cannot under any circumstances be considered as a basis of negligence; at best it can be regarded only as an anticipatory item of rebuttal dealing with

a possible defense, which might be asserted, on one phase of the case.

After appellees had rested, appellant moved to compel them to elect upon which of the two theories they would rely for verdict (R.360), upon which motion the court failed to rule. Hair's alleged recklessness, which, appellant contends, utterly failed in proof, cannot be urged as a valid one. In its decision (145 F. 2d 768) this court said:

> "We have not considered, and think it unnecessary to decide whether, on a proper state of facts, this theory is a valid one."

The two theories in the case necessarily lead to confusion. One is predicated on simple negligence, and the other on the geust statute. Furthermore, under the facts as heretofore detailed and hereafter argued, it becomes apparent that such theory in this case was wholly invalid.

III.

TRIAL COURT ERRED IN ADMITTING EVIDENCE AND REFUSING TO STRIKE TESTIMONY OF MYERS INCIDENT

(ERRORS III-XXI, XXVIII-XXIX, XXXV-XXXVII)

This court, in its opinion at 145 F. 2d 768, said:

> "We have concluded that the judgment must be reversed because of error in the reception of proof concerning Hair's previous record as a driver and because of the submission of that issue to the jury."

The court referred to proof relating to an accident in Poca-

tello in which Hair was involved, which "resulted in the killing of a pedestrian and in Hair's arrest on a criminal charge," which accident occurred "more than three years prior to the accident in which Mrs. Newby was fatally hurt." It appears definitely concluded by the Circuit Court that the reception of evidence, as proof of such matters, constituted fatal error, as did the submission "to the jury the issue of Hair's previous record."

Notwithstanding the decision of this court, about one-half of the record of the second trial is taken up with proof of the Myers accident. After appellees had introduced some evidence touching the accident in which Mrs. Newby was injured, they then began to introduce the cross-examination of A. E. Darr (R.214), taken on deposition prior to the time of the first trial. The original testimony of Mr. Darr on direct examination had not been introduced. The trial court by admitting that testimony permitted appellees, over objections of appellant, to bring out divers and various details of the Myers accident. A number of the questions asked Mr. Darr, to which appellant interposed objections, appear in Specifications of Error, Nos. III-XV. In the course of that testimony, appellees were permitted to introduce in evidence, over objections of appellant, Exhibits B, C, D, E, and F, all of which were inter-office correspondence dealing entirely with the Myers incident.

The trial court then permitted appellees to call, under cross-examination, L. R. Donnelly, and to ask him numerous questions touching his knowledge of the Myers incident. Appellant's objections thereto are set out in specifications numbered XVI-XXI. Donnelly was compelled to testify, over

appellant's objections, that he attended the preliminary trial "in which Hair was indicted for manslaughter"; that he had read newspaper articles touching the Myers trial; that he heard Mr. Pugmire testify that Hair was under the influence of intoxicating liquor when he struck Myers, and to answer numerous other questions of similar import. The court then permitted appellees, over appellant's objections, to introduce in evidence Exhibit A, being part of a civil complaint filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, by Bertha Myers et al, against R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair (Appendix "2"); also to introduce in evidence Exhibit 24, which is a certified copy of the prosecuting attorney's information and the verdict of the jury, in the case of State of Idaho v. Rulon D. Hair (Appendix "3"). See specifications numbered XXVIII and XXIX. Appellant objected continually to the introduction of such and frequently urged it was immaterial and prejudicial and, as appellant contends, contrary to the decision of the Circuit Court.

The trial court apparently attempted to justify the introduction of that evidence "on the question of knowledge to the Company as a waiver of the rule on hauling guests" (R. 219). But it is to be observed that most of this evidence had no connection whatever with the so-called waiver. The complaint in the Myers suit in the State Court (Appendix "2") and the criminal complaint and verdict (Appendix "3") make no reference to a guest, and hence their admission cannot be justified on this theory.

Furthermore, such evidence was utterly immaterial on the

theory suggested by the court, particularly at that stage of the proceedings. Whether or not Hair was in the habit of hauling guests was wholly immaterial in so far as his alleged negligence was concerned. Whether or not he was acting contrary to instructions in hauling a guest is evidence tending to establish appellant's position that Hair was acting outside the scope of his employment, and clearly was a matter to be asserted defensively. Obviously, before any such testimony was interposed or evidence offered in support of the employer's injunction against the hauling of guests, it was wholly immaterial and prejudicial to permit the introduction by appellees of any evidence touching the Myers incident or any other incident touching on the hauling of guests. In other words, the entire Myers incident, with all of its ramifications, was permitted by the trial court to be dragged in and heralded before the jury, apparently under the screen of showing a waiver of something which, to that point, had not been claimed. Furthermore, appellees knew that there would be no denial on the part of appellant that it knew of the Myers incident nor that it knew that Hair, at that time, had hauled a guest in addition to his wife; those facts were developed at the first trial.

Even if the evidence touching the Myers incident had been offered to show waiver of the instruction against the hauling of guests, it was, and is, wholly immaterial in this case. This is so because of the testimony of Mr. Donnelly (R.295-296; 303-304) and of Mr. Hair (R.381-382) that, after the Myers incident, there was a conference in a hotel in Pocatello between Donnelly, Roe, Hair, and his wife,

wherein Hair was emphatically advised that, if he was continued in the employ of appellant, he must thereafter constantly and always observe the rule of not hauling guests in the company's car and, that if such should ever occur again, he would be discharged promptly. He agreed to this. There isn't a scintilla of evidence in the record showing that the appellant ever knew, of Hair's hauling of a guest after the Myers incident.

Appellant commenced anew with Hair after the Myers incident. The agreement against the hauling of guests, relating to the car involved in the Newby case, was subsequently signed. To argue, therefore, that the hauling of a guest in the Myers incident could be pertinent in the instant case, arising 3½ years after the Myers incident, on the question of waiver of this injunction, is not only illogical but contrary to the subsequent agreement of the parties. On any theory, therefore, that testimony, particularly at the time it was offered, was wholly immaterial and highly prejudicial, and its effect was to inflame and prejudice the jury against appellant.

Notwithstanding the fact that the court presumably admitted such testimony on the theory of waiver, nevertheless, it instructed the jury on the alleged status of Hair as a reckless and incompetent driver. Those instructions, to which appellant took exception, are set out in Specifications of Error numbered XXXV-XXXVII. There was no additional evidence, anywise competent, touching Hair's status as a driver, not relegated to relatively the same position as in the previous trial, namely, that such evidence was wholly insufficient to

fasten upon Hair the status of an incompetent driver. This court, in its original opinion (145 F. 2d 768), aptly said:

> "If this item of evidence had been excluded, the showing as regards the employee's prior known record would consist of a single incident, and the significance even of that is seriously in dispute. On the side of the employer it was claimed that the Pocatello accident was the result of the negligence of the pedestrian rather than of the driver; but even if the contrary be assumed it can hardly be thought that one instance of negligence is sufficient to brand a driver as careless or incompetent to the degree that his retention in service is thenceforward at the employer's risk. The frailty of this species of proof is notorious. See Olson v. North Pac. Lbr. Co., C. C., 106 F. 298; Guedon v. Rooney, 160 Or. 621, 87 P. 2d 209, 218; Pittsburgh Rys. Co. v. Thomas, 3 Cir., 174 F. 596. It was error, therefore, to submit to the jury the issue concerning Hair's previous record."

IV.

TRIAL COURT ERRED IN ADMITTING AND REFUSING TO STRIKE TESTIMONY OF PUGMIRE, CLOSE AND BUSKIRK (ERRORS XXII-XXVI)

Appellees may argue that they introduced evidence tending to show Hair had a reputation as an incompetent driver. Appellees, attempting such proof, called as witnesses, R. M. Pugmire (R.309-328), Sid Close (R.328-335), Ben Buskirk (R.335-341), and Frederick Smullen (R.341-343), and interrogated them as experts touching Hair's reputation as a careless, reckless, or drunken driver. At the outset it will be observed that Close was a sheriff, and the other three were policemen. They were in a specialized group. They were not

people with whom the average individual would come in contact. Defendant objected to that type of testimony in each instance upon the ground that it was incompetent and no proper qualifications had been laid for its reception. See specifications numbered XXII-XXVI. Pugmire, Close, and Buskirk testified on direct examination that the reputation of Hair was bad. Smullen, who said that he was present at the time of the Myers incident and had lived in Pocatello for 28 years, testified on direct examination as follows:

> "Q. Did you, or do you, know the reputation of Rulon D. Hair in this community as being a reckless, drunken driver, or a sober, careful driver? A. No.
>
> Q. You don't know? A. No, sir.
>
> MR. DAVIS: That's all." (R.343.)

Smullen's testimony is highly significant in the light of other testimony attempted to be adduced.

Pugmire, on cross-examination, testified that his entire conclusion was based on the Myers incident and talk he had heard about Hair from officers at Dubois and the Newby incident. He was asked and answered the following question:

> "Q. You have not heard anything bad about his driving automobiles on any other than those three occasions? A. That's right." (R.322.)

He then attempted to justify his conclusion on comments he had heard from officers. He then testified as follows:

> "Q. You hadn't the information from the general public? A. No, sir.

Q. You never heard anything from the general public touching the fact that Hair was a drunken, incompetent and reckless driver? A. Not that I recall.

Q. You have no information from the public at large that would lead you to testify as you have this afternoon? A. That's right.

Q. You never advised anyone that you had such information? A. No, sir." (R.322.)

The testimony of Close and Buskirk is similar to that of Pugmire. Close testified that he based his answer as to Hairs' reputation on what he himself had seen at Dubois. Upon motion of appellant, Close's testimony touching reputation was stricken (R.332-333). Appellees then attempted to reconstruct him but, appellant most earnestly contends, without effect. Appellant made a second motion to strike his testimony, which motion was "denied for the present" (R.335). Buskirk's testimony was similarly weak (R.335-341); at its conclusion, a motion made by appellant to strike his testimony was denied (R.341).

Outside of the Myers incident, the foregoing constitutes every bit of evidence, if it can be called evidence, attempting to support the theory that Hair was a reckless, incompetent, or drunken driver. Aside from the fact that such evidence is wholly insufficient to support such contention, appellant urges the following:

(a) Hair's status as an alleged incompetent driver could not be proved by reputation nor by the opinion of police officers. In Pantages v. Seattle Electric Co. 55 Wash. 453, 104 P. 629, the rule is aptly stated in sylabus No. 2:

> "A witness cannot be permitted to give his opinion as to the competency of a person as an automobile driver, for the jury is as competent to draw an inference from the facts upon which such an opinion must be based as witness."

To the same effect see:

> State v. Kirby, 62 Kan. 436, 63 P. 732;
>
> Hobson v. New Mexico and A. R. Co., 2 Ariz. 171, 1 P. 545;
>
> Gier v. Los Angeles Consol. Elect. Ry. Co., 108 Cal. 129, 41 P. 22;
>
> Cosgrove v. Pitman, 103 Cal. 268, 37 P. 232.

In Guedon v. Rooney, (Or.) 87 P. 2d 209, 120 A.L.R. 1298, it was held that the opinion of a police officer as to a driver's recklessness and drunken driving on previous occasions was inadmissible. In Shaw v. Skopp, 190 N.Y.S. 859, 198 App. Div. 618, it was held that an opinion as to incompetency of a driver to drive an automobile was inadmissible, such not being the subject of opinion evidence. See also Moulder v. State, 9 Ga. App. 438, 71 S. E. 682. In Moore v. Norwood, (Cal.) 106 P. 2d 939, at 942, the following rule is stated:

> "Opinion evidence is never admissible upon a subject which is capable of direct proof and when the ultimate question can be otherwise ascertained and made intelligible to the tryer of fact. In other words, whenever the question to be determined is the result of the common experience of all people of ordinary education, or such result is to be inferred from particular facts, such inference must be drawn by the jury and not by the witness."

In Johnson v. Caughren, 55 Wash. 125, 104 P. 170, the decision of the court is expressed in the syllabus, as follows:

> "An opinion as to the incompetency of a servant to perform the duties for which he was employed being acquired from observing his conduct, or from knowledge of his experience or lack of it, which matters could be related to the jury substantially as they were observed by the witness, the jury was quite as capable of drawing just inferences therefrom as the witness, so it was the province of the jury to draw the inference."

Under such a rule ,obviously opinion evidence on the ordinary conduct of an individual is not admissible. Furthermore, such testimony, if admissible, would not prove that the appellant had knowledge thereof. This point is expressed in Tucker v. Constable, 16 Ore. 407, 19 P. 13, wherein it is recited in the syllabus:

> "Where it becomes necessary to prove that the defendants had knowledge of a particular fact, proof that such fact was 'generally known' is not competent for that purpose."

(b) The motion to strike the testimony relating to reputation should have been sustained. Appellant assigns as error the refusal of the court to strike the testimony of those witnesses after, on cross-examination, they had shown themselves to be without information sufficient to give an opinion. It is held in Edwards v. Clark, (Utah) 83 P. 2d 1021, that the testimony of a witness is no stronger than is shown by the cross-examination. In Peterson v. State, 90 Fla. 361, 106 S. 75, the rule is well stated in syllabus No. 2, as follows:

> "Where it appears, from cross-examination of a

witness who had testified as to the general reputation of the prosecutrix as to chastity, that such witness had no knowledge of such general reputation, and bases his testimony thereto solely upon specific conduct, such as having seen the witness in questionable places on several occasions, and having arrested her once for 'loitering,' his testimony as to general reputation is shown to have been not legally predicated, and the granting by the court of a motion to strike all of the testimony of such witness is not erroneous."

V.

TRIAL COURT ERRED IN REFUSING TO STRIKE TESTIMONY OF WILLIAMS

(ERROR XXVII)

Appellees called as a witness F. M. Williams to testify as to the general reputation of Avenell Newby in the community in which she lived. He testified that he was a Senator in the State Legislature and had known Avenell Newby in her lifetime. Over the objection of appellant that his testimony was incompetent, irrelevant, immaterial, and without proper foundation, he was permitted to testify that her general reputation in the community "was good so far as I know" (R. 486). On cross-examination he testified that what he meant was that he had never heard her character discussed by anybody in the community and just knew that she was a lady living in Montpelier (R.486-487). Appellant thereupon moved that his entire testimony be stricken upon the ground that there was no foundation of any kind or character upon which he could base his conclusion (R.487), which motion the court denied (R.491). The court seemed to entertain the erroneous view that Williams should have been cross-examined before

he gave his answer (R.487). Orderly cross-examination, however, could not accomplish such a purpose. The argument made and the authorities cited, supra, dispose of such erroneous view. It is abundantly clear from the authorities that such motion should have been granted. Here we have a State Senator, undoubtedly called because of the office he held, telling the jury that here was a good woman, when he knew absolutely nothing about her. His testimony could have had but one effect namely that of influencing and prejudicing the jury. The motion to strike such testimony should have been granted. See: Peterson v. State, 90 Fla. 361, 106 So. 75.

VI.

INSUFFICIENCY OF THE EVIDENCE TO SUPPORT THE VERDICT

(ERRORS XXX, XXXI, XXXIV)

At the conclusion of the evidence, appellant moved for a directed verdict based upon the insufficiency of the evidence (R.488-491). This, the court denied, with the suggestion that the same matters could be subsequently raised (R.492). Thereafter appellant presented its petition on motion for judgment, notwithstanding the verdict, and in the alternative for a new trial and a motion for a new trial (R.69-96). This motion was denied.

This Court stated, preliminarily, (145 F. 2d 768) its views on certain controversial matters were predicated on the assumption that the showing on a second trial would not differ materially from the first. Because of the way in which the case was tried and the additional evidence adduced, appellant feels

it proper to argue the errors assigned. Appellees presented this case on two theories:

(1) That Hair was an agent of appellant, acting within the scope of his employment at the time Mrs. Newby was injured; and

(2) That he was a careless, incompetent driver, and that such fact was known to the appellant.

The motion for a directed verdict was presented to the entire case and then made independently as to the second point above stated. The trial judge was in doubt particularly as to the second point, as indicated by his comment: "I am inclined to think that the one allegation as to the employment of Mr. Hair knowing him to be a reckless, drunken and incompetent driver should not be submitted to the jury." (R.491). Later the cause was submitted on both points and the jury so instructed.

Under such circumstances, it is urged that, if the evidence fails to support the verdict on both theories, the same must be set aside. Crowell v. Duncan (Va.), 134 S. E. 576. Appellant will present this matter under three sub-headings:

1. Hair was not an incompetent driver.

Elsewhere in this brief, argument has been made touching this point. Notwithstanding approximately half of the evidence adduced was directed toward this matter, yet we have nothing more in reality than the Myers accident, three and one-half years before the Newby accident. The Myers incident, of course, was definitely held by this Court to be insufficient.

The only other evidence which appellees attempted to offer was the testimony of a sheriff and policemen as to what they thought about Hair. When that testimony is analyzed, it is reduced to a conclusion based upon the Myers incident, which alone was insufficient, and as to the witness Close, upon an incident which he claims occured at Dubois, Idaho, which was likewise approximately three years before the Newby incident.

Aside from the fact that such testimony was given by these officers was immaterial and incompetent, as heretofore argued, the whole of it is totally insufficient upon which to predicate a verdict, particularly when it must be further shown that appellant had knowledge of it. Here the proof breaks down completely. If, for the sake of argument, it could be urged that such testimony touching reputation was proper, it is to be observed that in each instance it came from police officers and not from the general public; even here Policeman Smullen, who had had as much contact as any of the other officers with the Myers case, admitted frankly that he did not know whether Hair's reputation as a driver was good or bad (R.343).

It is significant that appellees did not call witnesses engaged in ordinary business affairs, or people with whom the appellant would likely deal. It is not customary for an employer to be in such contact with police officers that it might get such information, if, indeed, it existed. The fact that Donnelly was in the territory could not help under those circumstances, for he testified definitely that he had never heard anything improper touching Hair's conduct, from the date of the Myers accident (R.302, 478-480, 483). It is

significant that the jury did not find against Donnelly. In view of this testimony, it is earnestly contended that such matter should not have been submitted to the jury.

This matter is within the rule announced in the following cases: Pittsburgh Rys. Co. v. Thomas, 174 F. 591, wherein, at 595, the Third Circuit Court said:

> "A man perfectly competent in all respects for the duty he undertakes to perform, may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence."

Guedon v. Rooney, 87 P. 2d 209; Olsen v. Northern Pacific Lumber Co., 106 F. 298.

It is therefore urged that the evidence completely fails to show, first, that Hair was reckless or incompetent as a driver and, secondly, that if such had been the case no knowledge thereof ever came to appellant. On the contrary, the evidence is positive that Hair distinguished himself as a competent driver and received safety awards therefor (R.245, 258-262, 412-414, Exhibits 20, 21, 22 and 27). To submit such mater to the jury, along with the other points, would not only lead to confusion, but may have been the precise point upon which the jury attempted to render its verdict.

2. Hair was not acting in the scope of his employment.

From about the hour of 9:30 p. m. on the evening of September 10, 1942, until about 4:20 p. m. on September 12, 1942 (R.390-395), Mrs. Newby and Rulon D. Hair were engaged exclusively on a party of their own. The party

was solicited by Mrs. Newby (R.385-389, 461-463). There is not a scintilla of evidence indicating the contrary.

Additional evidence was presented at the second trial touching this trip. Mr. Rasmussen testified that he first saw Mrs. Newby "out by the cabin" (R.450), where he and Hair were stopping, and that he rode with her and Hair and Mr. Higson up to the Aero Club that evening (R.451). He did not come home with them. The next morning he found no one had occupied Hair's room (R.452). He then went to Soda Springs and saw the panel truck in front of the Enders Hotel. He went up to Hair's room and Hair opened the door. He saw Mrs. Newby there in the bed (R.453).

Charlie Nichols testified that he was night clerk at the Enders Hotel, and that one night Hair came to the hotel and registered. He had a woman with him, and they went to the room and occupied the same room (R.372-373). He fixed the time as being just before the accident, which he heard of later. The register sheet of the hotel records for that night was missing (R.373). While Hair had stopped at the hotel before, he never had a woman with him at any other time (R.374). He admitted that he saw Nichols at the time he registered and had Mrs. Newby with him (R.394).

Hair's testimony then continues and is similar to that given at the previous trial. He and Mrs. Newby left the Aero Club in Montpelier and, at her solicitation, went to Soda Springs, arriving there at about 5:00 or 5:30 in the morning of September 11th, registered in one room, where they occupied the same bed and went to sleep, up until about 11:00 or

11:30 a. m. (R.416); then went down to the Oasis Club in Soda Springs, where each of them ate and drank and played slot machines (R.394-397). He then drove over to Grace to see Mr. Rasmussen to ask him to tell his wife that he would be late getting home to Pocatello, and thereafter drove to Montpelier to take Mrs. Newby home.

He was asked, and answered, the following questions:

> "Q. Did you transact any business for the defendants at Grace on this trip? A. No, sir.
>
> Q. Did you transact any business for the defendants at Soda Springs? A. No, sir.
>
> Q. Your entire attention was given to this lady? A. Yes, sir.
>
> Q. What did you do after you left Grace? A. Started to Montpelier.
>
> * * * *
>
> Q. What was your objective? A. To take Mrs. Newby home and get my baggage.
>
> Q. And you drove to Montpelier? A. Yes, sir.
>
> Q. Your first objective was to take Mrs. Newby home? A. Yes, sir." (R.398).

Later he testified as follows:

> "Q. At the time of the accident, were you on the business of the owner of the car? A. No, sir, I wasn't.
>
> Q. Had you been for some time, probably since you picked her up at Montpelier the night before? A. No, sir.

Q. During the period of time from the time you picked her up on the evening of the 10th at Montpelier until the accident happened on the highway about four-thirty on the afternoon of the 11th, had you been doing any business for either of these defendants, the R. J. Reynolds Tobacco Company or L. R. Donnelly? A. No, sir.

* * * *

Q. You knew that you were not doing business for the Company and that you were out on a party of your own at that time? A. Yes, sir." (R.411-412).

From the testimony it becomes apparent, both from the answers to direct questions and the recitation as to what Hair was doing, that he did not perform one single item of business for the company during that entire time. It is highly significant that, notwithstanding this was the second trial and appellees fully knew the position of appellant and had had ample time to make investigation, they did not offer a single item of evidence contradicting this fact. Such argues with compelling force that no evidence existed which would tend to show Hair was engaged in any business of his master.

Appellees relied entirely upon presumptions arising from some evidence that the car belonged to appellant; that it had appellant's advertising on the panel doors; that it was traveling in the territory during business hours and had within it products of the Company and, that Hair made report (which was later explained, R.411-412) that he was on company business.

But a presumption does not amount to evidence. In Offord

v. Jenner's Estate, (Mo. App.), 189 S. W. 2d, 173, it is said that "the general rule is that when facts come in presumptions vanish". In Witthauer v. Paxton-Mitchell Co. (Neb.) 19 N.W. 2d 865, decided October 5, 1945, the court definitely rules that a presumption is not evidence. Such rule is well stated in the syllabus, as follows:

> "The presumption that employee, driving employer's truck when accident occurred, was acting within the scope of his employment, disappears when evidence shows that employee was engaged in his own personal affairs, and the plaintiff is then required to show by evidence that the act of driving truck was within scope of employment."

Also,

> "A presumption is not 'evidence' and will not prevent a directed verdict, when evidence rebutting it is convincing and undisputed."

The Idaho Supreme Court has held on several occasions that a presumption that an agent was within the scope of his employment simply because he had the master's car is definitely overcome by positive evidence to the contrary.

In Willi v. Schaefer Hitchcock Co., 53 Ida. 367, 25 P. 2d 167, speaking of this presumption, the Court at 371 says:

> "It is equally well settled that, where the evidence offered to establish facts which would rebut this presumption * * * are undisputed and uncontradicted, it becomes properly a question for the court."

Again, in Magee v. Hargrove Motor Co., 50 Ida. 442, 296 P. 774, the Idaho Supreme Court affirmed the trial court in granting a nonsuit in favor of the owner of an automobile

whose employee was using the automobile on a pleasure trip of his own. The court says:

> "Thus, if it be shown that the person driving the car was at the time of the accident an independent contractor, or an agent or servant of the owner but using the car for his own business or pleasure, the owner is not subjected to liability."

In Baldwin v. Singer Sewing Machine Co., 49 Ida. 231, 287 P. 944, this rule is again announced. In that case the court held that, where an employee was employed to sell sewing machines, and after a business trip made outside of the city he returned, parked his car, went to the company's office and, finding no one there, went to a cafe, had supper, did several errands and, on his way home struck a pedestrian, the employer was not liable, and that the presumption arising out of the use of the employer's car was definitely overcome. The same rule is again announced and followed in Joslin v. Idaho Times Pub. Co., 56 Ida. 242, 53 Pac. 2d 323. The argument in every one of these cases is forcefully applicable to each and all of the other presumptions above referred to, and there is no Idaho authority to the contrary. There are other cases on some of these other points holding to the same effect.

In White v. Firestone Tire & Rubber Co., 90 F. 2d 637, the Fourth Circuit Court considered a case where an employee was entrusted with an automobile owned by the company and to be used by the employee as a salesman. The automobile had printed on each door the word "Firestone". The salesman was using the car along the highway in the daytime to attend a football game. An accident occured, and the court held that

the presumption of scope of employment had been overcome and, no testimony appearing to the effect that he was in the busines of his master, the Firestone Company was held not liable.

It is to be noticed in the Firestone case that the three presumptions, involved in the case at bar, were present, namely: (1) Ownership of the car by Firestone Company: (2) Name of Firestone on the car doors, and (3) Driving along the highway during business hours.

In Allen v. Ross (Ark.) 138 S. W. 2d 409, a case almost identical with the one at bar, a tobacco company salesman was driving a company truck loaded with tobacco company products. He was traveling up and down the road in search of a woman companion. They had been on a pleasure trip together. The court held that the tobacco company was not liable. In that case, several of the presumptions here under consideration were present and completely overcome by the testimony as to what the man was doing.

In Loucks v. R. J. Reynolds Tobacco Co., 188 Minn. 182, 246 N. W. 893, a salesman driving the company's truck, and whose duty it was to post advertising signs, left his work and went on a fishing trip. An accident occurred, and the court held the tobacco company was not liable. At page 896 the court said:

> "We are of the opinion that, when Bagley took appellant's car on the trip from St. Paul to Pryor Lake, he was not acting as the agent and employee of the appellant within the scope and course of his employment, but, on the contrary, that he was a wrongdoer and appellant was not liable for his acts."

In the case of Saltas v. Affleck (Utah), 102 P. 2d 493, a driver of a grocery company truck made his last delivery about noon and then picked up two girls, whom he promised to give a ride into the business section of the city. On the trip he became involved in an accident. The court held that, when the driver picked up the girls, he departed from the course of his employment and the responsibility of his employer for his acts ceased as a matter of law.

In Silva v. Traver (Ariz.) 162 P. 2d 615, decided October 15, 1945, the court, with reference to the effect of the presumption above discussed, suggests that it may be "prima facie evidence' 'that the servant was using the vehicle in the business of the owner, but such is overcome by facts. On page 617, the court says:

> "But 'prima facie evidence,' so called, is, strictly, no evidence at all. It is only a presumption of law. Barton v. Camden, 147 Va. 263, 137 S. E. 465. It has been uniformly so treated and denominated by this court. Baker v. Maseeh, supra; Lutfy v. Lockhart, 37 Ariz. 488, 295 P. 975. And such presumptions are mere arbitrary rules of law, to be applied in the absence of evidence. Whenever evidence contradicting a legal presumption is introduced the presumption vanishes. Seiler v. Whiting, 52 Ariz. 542, 84 P. 2d 452; Flores v. Tucson Gas, Elec. L. & P. Co., 54 Ariz. 460, 97 P. 2d 206."

Appellees urged that Hair sent in to his employer two reports of the accident in which he said he was on company business. Those reports were not under oath. Hair clearly explained them. He testified that those statements were false (R.411). He understood that he would be fired immediately,

if the company knew of his conduct (R.382, 384, 390); hence those reports.

Concerning those reports, he was asked why he wrote "owner" in answer to the question, "Was the driver on own business or that of owner?" (R.411). His answer was that he understood that Mrs. Newby's condition at the hospital was favorable, and he did not want the company to know he had a guest with him or that he was not out on business of the company (R.412). In order to protect himself in his job, he made the false reports. This item therefore is completely overcome and explained by Hair's testimony and there is no evidence to the contrary. Hence there was nothing left to consider.

It is to be remembered that Hair was in nowise connected with the appellant when he testified. He had previously been discharged and had accepted a verdict of $7,500.00 against him. He was as much an independent witness as any other witness that was called. But, even if it be considered that he was an employee of the company, nevertheless the court could not disregard his testimony.

It is held in Chesapeake & O. R. Co. v. Martin, 283 U.S. 209, 75 Law Ed. 983, that:

> "In considering whether a demurrer to evidence should be sustained, the court is not at liberty to disregard the testimony of a witness, on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying counterveiling inferences or suggesting doubt as to the truth of his statement, unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable."

See, also, Pennsylvania R. R. Co. v. Chamberlain, 288 U.S. 333, 77 Law Ed. 819 wherein it is held in syllabus No. 5: "A jury is not at liberty to disregard testimony because the witnesses are employees of one of the parties." Of course the same rule would apply to the court in considering the evidence on a motion for a directed verdict.

The Idaho Supreme Court, in Magee v. Hargrove Motor Co., supra, speaking of overcoming a presumption of agency because of ownership of the car, says:

> "And such presumption may be rebutted and overcome by evidence adduced during the trial by the testimony of any of the parties to the suit."

See, also, International Co. v. Clark, 147 Md. 34, 127 A. 647.

Surely there can be no doubt whatever in the mind of this Court that Hair was, at the time of the accident, and had been for hours theretofore, engaged in a party of his own, solicited and freely acquiesced in by Avenell Newby. A positive miscarriage of justice would result if appellant, who had previously given Hair employment, be compelled to respond in damages for Hair's highly improper departure from the services for which appellant had employed him.

3. Hair was outside the scope of his agency in hauling a guest contrary to instruction.

If, as we contend, Hair was entirely outside the scope of his employment at the time of the accident, it would make no difference whether he was hauling Avenell Newby contrary to instruction or whether that instruction had been

waived. The existence and violation of such instruction is merely another reason why he was not in the scope of his employment. In February 1942 the panel truck which Hair was driving at the time of the accident was turned over to him (R.248) and he entered into an agreement in writing which contained the following language:

> "I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company's business as directed by my division manager. I understand that under no consideration am I to permit anyone save and except an employee of R. J. Reynolds Tobacco Company to ride with me in said car." (R.251).

When an employee using the employer's automobile hauls a guest contrary to such instructions he is definitely outside the scope of his employment and the master is not liable for injuries that may occur. See such cases as:

> Chajnacki v. Dougherty, 254 Mich. 296, 236 N. W. 789;
>
> Albers v. Shell Oil Co., 104 Cal. App. 733, 286 P. 752;
>
> Hartigan v. Public Ledger, 291 Pa. 588, 140 A. 524;
>
> Psota v. Long Island Ry. Co., 246 N.Y. 388, 159 N.E. 180;
>
> Welch v. O'Leary, 287 Mass. 69, 191 N.E. 377.

Appellees contend that this instruction was waived because of the Myers incident and that Hair hauled other guests of which the Company knew, or might have known. How-

ever, the Myers incident can have absolutely no effect upon this instruction, and whether or not Hair was hauling a guest when that incident occurred is wholly immaterial. This is so because after the Myers incident there was a definite and positive understanding between Hair and appellant's supervisors that if this ever occurred again, Hair would be discharged immediately. There was no temporizing with this (R.382, 478). It cannot be argued that the previous offense could constitute a waiver when the definite agreement was later reached touching the enforcement of this matter. Thereafter, and over a period of 3½ years, appellees contend that Hair hauled three or four guests at various times and places. That such was not known to either Donnelly or the Company clearly appears from the testimony of Hair, Donnelly, and Darr. Hair testified that he made a mis-statement in his first report to the Company after the Newby accident, because he knew he would be fired if the Company learned that he had hauled a guest (R.412). Donnelly testified that the hauling of guests had never come to his knowledge (R.304, 478-479). Darr testified similarly (R.244-245, 256-257). No other agents of the Company were in the vicinity. The territory was large, and those derelictions, with the exception solely of the so-called Dubois incident, occurred within a vey few days of the Newby accident. There is ,therefore, a complete lack of evidence in the present case to show that such disregard was "notorious." The testimony is conclusive to the contrary. Appellant, therefore, most earnestly urges that the rule suggested in Manion v. Waybright, 59 Ida. 643, 86 P. 2d 181, touching waiver, does not apply.

It may be argued that there is at least a scintilla of evidence to support the appellees' theories. While appellant does not admit this to be true, yet, even if so, still the judgment cannot stand. In Pennsylvania Ry. Co. v. Chamberlain, 288 U. S. 333, 77 L. Ed. 819, on page 825, it is said:

> "The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned. Schuylkill & D. Improv. Co. v. Munson, 14 Wall. 442, 448, 20 L. Ed. 867, 872; Marion County v. Clark, 94 U.S. 278, 284, 24 L. Ed. 59, 61; Small Co. v. Lamborn & Co. 267 U.S. 248, 254, 69 L. Ed. 597, 600, 45 S. Ct. 300; Gunning v. Cooley, 281 U.S. 90, 74 L. Ed. 720, 50 S. Ct. 231, supra; Ewing v. Goode, supra, (C.C.) 78 Fed. 443, 444."

VII.

MAXIMUM LIABILITY OF APPELLANT

(ERRORS XXXII, XXXIII, XXXIX, XL and XLI)

If it should be determined that appellant is liable in damages to appellees for the conduct of Rulon D. Hair, then such liability cannot in any event exceed the sum of $7,500. Judgment for that amount against Hair became final, and the employer's liability in this case cannot be greater than that of the employee. This position of appellant was called to the court's attention when the trial commenced (R.110-113). When the court instructed the jury, it refused to recognize this doctrine. On the contrary, the court instructed the jury that "the amount of damages, if any, which you allow shall in no event exceed the amount prayed for in plaintiff's complaint" (R.504). The court permitted the jury to take the

pleadings to the jury room (R.493). The complaint contained a statement of the amount prayed for. Appellant excepted to that instruction, upon the ground that "plaintiffs in this case should not be allowed to recover more than $7,500, the same being the amount heretofore awarded against R. D. Hair * * *" (R.511).

Appellant had previously tendered to the court requested instructions (R.491), among which were requested instructions Nos. 11 and 12, in each of which the court was requested to instruct the jury that, as a matter of law, the maximum amount of damages which could be awarded was $7,500 (R. 512-513). The reason for these requested instructions was in each instance asserted. This error is raised by specifications of error Nos. XXXII, XXXIII, XXXIX-XLI.

It is a fundamental rule of law that an amount recovered as actual or compensatory damages, in a tort action against a person who was the active tort-feasor, is the limit of the amount recoverable as such damages against a person whose responsibility is solely derivative. In this case appellant's liability, if any, is because of the conduct of Rulon D. Hair, and its liability, if any, is purely derivative. Even if it could be successfully urged that appellant was negligent in employing Hair, such would not alter the rule, because it was Hair's conduct that caused the damage, but for which there could not have been liability.

The rule is clearly stated in Freeman on Judgments, Fifth Edition, sec. 469, P. 1031, as follows:

> "'* * * the rule is general and well settled that where the liability, if any, of a principal or master to

> a third person is purely derivative and dependent entirely on the principle of respondeat superior a judgment on the merits, in favor of the agent or servant, or even a judgment against him, in so far as it fixes the maximum limit of liability, is res adjudicata in favor of the principal or master, though he was not a party to the action'."

The rule is stated in All v. Delaware & H. R. Corp., 29 N.Y.S. 2d 439, on P. 441 as follows:

> "To permit a plaintiff to have damage in a greater amount against a master for the act of the servant than was allowed against the servant for the same act and for the same result would be an incongruity, if, indeed, it afforded the master, in respect to ad-measuring damages, the equal protection of the laws of the state within the intent of Constitution, Art. I, sec. 11."

When the jury in the first case returned a verdict against the three defendants for $7,500, the judgment rendered thereon, from which appellees did not appeal, clearly became an adjudication of the maximum amount of damages. Surely appellant is not accorded equal protection of the law if damages can be assessed in one amount against the servant and in greater amount against the master, when the master's liability is derivative, arising solely because of the conduct of the servant.

The rule is aptly stated in Pinnix v. Griffin, 221 N.C. 348, 20 S.E. 2d 366, 141 A.L.R. 1164, in syllabus No. 1, as follows:

> "A judgment in a tort action in favor of the agent or servant, or even a judgment against him in so far as it fixes the maximum limit of liability, is res judicata in favor of the principal or master whose liability, if

> any, is purely derivative and dependent entirely upon the principle of respondeat superior, though he was not a party to the action."

Again, in syllabus No. 3, the rule is stated:

> "A judgment against the servant, from which no appeal was taken, in a tort action against master and servant, is conclusive against plaintiff, in so far as it fixes the maximum limit of liability for which master may be held, upon a new tral after reversal of a judgment of nonsuit as to him."

In that case suit was instituted against the servant and corporate employer on a charge of negligence of the servant. The first trial resulted in a judgment of nonsuit in favor of the employer, and a judgment on verdict for $1,000 against the servant. An appeal was taken from the judgment of nonsuit. There was no appeal from the judgment against the servant. The actionwas reversed and remanded for a new trial. Upon retrial, damages for $5,000 were adjudged in favor of the plaintiff and against the defendant employer. The defendant, in apt time, had tendered a requested instruction as follows:

> "In respect to the issue as to damages, if you come to consider that issue, the court charges you, as a matter of law, that in no event can you award damages in excess of the sum of $1,000.00."

The court declined to charge the jury as requested, and the defendant excepted. The Supreme Court of North Carolina held this to be error, stating:

> "This exception is the basis of the primary assignment of error on this appeal and presents this question: Can the master, under the doctrine of respondeat superior, be held in damages in an amount greater

than that assessed against the servant, or is the verdict and judgment against the servant conclusive and binding upon the plaintiff?

"The individual defendant and not the corporate defendant was the active tort-feasor. While it is true the appellant on the finding of the jury was negligent in the sense that the act of the agent, as such, is the act of or is imputed to the principal, it is, strictly speaking, liable only under the doctrine of respondeat superior. This is established by the verdict. It must pay the damages inflicted by its servant while he was about his master's business and acting within the scope of his employment. The amount of these damages has been ascertained and fixed by a jury in an action to which plaintiff was a party. She did not appeal. May she now recover a much larger sum from the master?"

After discussing numerous cases bearing upon this point, the court concluded:

"We conclude, therefore, that the original judgment, in so far as it fixes the maximum limit of liability, is as to plaintiff conclusive, and that the defendant is entitled to its day in court with full opportunity to defend on each of the pertinent issues raised by the pleadings. It follows that the court erred in declining to instruct the jury as prayed by defendant."

The State of California has a statute which limits recovery for death or an injury to person or property, resulting from negligence in the operation of a motor vehicle, to the sum of $5,000.00. The California courts have uniformly held that no sum can be assessed against the owner of a motor vehicle or the master, in excess of that assessed against the servant or operator of the vehicle.

Kerrison v. Ungar, 135 Cal. App. 607, 27 P. 2d 927;

Bradford v. Brock, 140 Cal. App. 47, 34 P. 2d 1048;

Daniel v. Jones, 140 Cal. App. 145, 35 P. 2d 1098;

King v. Ungar, 35 Cal. App. 2d 192, 94 P. 2d 1040;

Sparks v. Berntsen, ...Cal. App. 2d ....., 112 P. 2d 742.

In Bradford v. Brock, supra, on page 1050 it is said:

> "The reason for the rule is obvious. If the detriment to plaintiffs caused by the operator of the car is found by the jury to be $2,500.00, they should not be permitted to collect that sum from him and then go to the owner or employer, whose liability arises out of his relationship to the car or its operator, and not out of any independent act, and collect a further like sum, thereby obtaining double the amount to which plaintiffs are entitled under the jury's decision."

Among the many cases supporting this doctrine, see the following:

Betcher v. McChesney, 255 Pa. 394, 100 A. 124;

Holmboe v. Morgan, 69 Ore. 395, 138 P. 1084;

Stamos v. Portland Elect. Power Co., 128 Ore. 310, 274 P. 915;

Jenkins v. So. R. R. Co., 130 S. C. 180, 125 S.E. 912;

Johnson v. Atl. Coast Line Co., 142 S.C. 125, 140 S.E. 443;

Thomas v. Southern Grocery Stores, 177 S.C. 411, 181 S.E. 565;

Conway v. Kansas City Pub. Co., 234 Mo. App. 596, 125 S.W. 2d 935;

Romeo v. Western Express Co., 45 N.Y.S. 2d 297;

Feazle v. Industrial Hospital Assn. (Ore.) 103 P. 2d 300;

53 Am. Jur. page 461, Sec. 125.

This precise point has not been determined by the Supreme Court of Idaho. It will probably be argued that the case of Judd v. Oregon Short Line R. R. Co., 55 Ida. 461, 44 P. 2d 291, is contrary to this position, but an analysis of this case will remove this possible argument. In the Judd case, two verdicts were rendered, one for $1.00 against a railroad engineer, and one for a larger amount against the railroad company. The railroad company appealed and the judgment was affirmed. There is no argument in the case on the theory of derivative liability. The court held that "appellant is not in position to object to the verdict on the grounds of informality or insufficiency in the present case, for the reason that it made no objection at the time to the submission of separate verdicts to the jury, nor did it object or except to the reception of the verdicts when they were returned into court".

In the case at bar, appellant took exceptions to the verdict (R.66) and, as heretofore pointed out, raised the point in several different ways. Furthermore, in the Judd case, the court comments upon the fact that the engineer was merely doing his master's business and could not profit in any way beyond his wages. At most this is dictum, but in the case at

bar this fact is lacking. Hair was definitely on a party of his own, and nothing which he was doing could be of benefit to the master.

Again attention is called to the case of Judd v. Oregon Short Line R. R. Co., 4 Fed. Sup. 657, wherein this same case was remanded to the state court by Judge Cavanaugh, and in that opinion considerable is said concerning the allegations of the complaint. It is to be observed that, in addition to the allegation that the engineer failed to sound the whistle or ring the bell, there was alleged independent negligence on the part of the railroad company in the manner in which its roadbed was maintained and in permitting the public for seventeen years to use a road which came to an end upon its right-of-way, where it was necessary for cars to back around in order to get out. From those allegations of the complaint, it is entirely possible that the jury may have concluded that the principal negligence for which they awarded damages was the independent negligence of the railroad company, over which the engineer had no control.

In the Judd case the Idaho Supreme Court cites the case of Strickfadden v. Green Creek Highway District, 42 Ida. 738, 248 P. 456. An examination of that case shows conclusively that the question of derivative liability was in nowise involved. Here an action was brought by the plaintiffs against three commissioners of a highway district, the highway district, and its foreman, named Dasenbrock. The trial court granted a nonsuit as against the commissioners, and the jury returned a verdict against the Highway District but not against Dasenbrock. There was no fixing of liability upon the

agent, nor is there anything in the case from which it could appear that the liability of the Highway District was derivative.

In the case at bar we have an entirely different situation. Here Hair was using appellant's car for his own pleasure and the pleasure of Avenell Newby. To hold that, under such circumstances, the employer, innocent of any tortious activity, must be held for four times as much damage, is indefensible. The trial court, therefore, erred in instructing the jury that the amount prayed for in the complaint was the maximum liability rather than the amount of the judgment rendered against Hair, and in refusing to give appellant's requested instruction to this effect.

VIII.

ERROR IN INSTRUCTIONS

(ERRORS XXXV-XLIII)

Elsewhere in this brief reference is made to errors in giving certain instructions. Other reasons for these errors are here asserted.

In specifications numbered XXXV, XXXVI, and XXXVII, the court instructed the jury on appellees' theory that the appellant hired Hair knowing him to be an incompetent and reckless driver.

Appellant took exceptions to each of these instructions upon the ground that there was no competent or sufficient evidence justifying the submission of such a matter to the jury. The court elsewhere in its instructions advised the jury that all items touching the Myers incident dealt merely with the

question of a waiver of instructions against hauling guests. There was no reason for this instruction when the injunction against hauling guests had commenced anew after the Myers incident. But, this leaves merely the incompetent testimony of the police officers heretofore argued as the sole and only basis justifying such instructions. Such testimony being, as we contend, entirely insufficient and immaterial, the giving of the three instructions complained of necessarily tended to influence the jury and prejudice appellant and was reversible error.

> R. J. Reynolds Tobacco Co. v. Newby, 145 F. 2d 768.

The court gave an instruction, quoted in Error XXXVIII, to which appellant took exceptions, dealing entirely with the Idaho statute on simple negligence. This case deals with violation of the guest statute. This statute does not deal with simple negligence. An entirely different course of conduct is required before liability can attach than if the case were one of simple negligence. In effect, the court advised the jury that if Hair was driving "in excess of 35 miles an hour," it may consider him liable for the results which followed. That such is erroneous, we contend, is obvious. It eliminates entirely the guest statute. The fact that the jury was instructed as to what the guest statute meant cannot help the case because at best, if the jury construed the instructions as a whole, it would have two rules for determining liability. This court in its opinion on the first appeal says:

> "This case is governed by the Idaho guest statute, sec. 48-901, Idaho Code, 1932, as amended."

Being governed by that statute, there can then be no excuse for an instruction of the character given in Error XXXVIII, and this very instruction may have decidedly influenced the jury. Appellant was not the driver of the motor vehicle and cannot, under the guest statute, be held to a greater degree of liability than the driver. The driver is not liable for simple negligence, but only for violation of the statute. See:

Gifford v. Dice, 269 Mich. 293, 257 N.W. 830;

Holmes v. Wesler, 254 Mich. 655, 265 N.W. 492.

The exceptions to the giving of the instruction quoted in Error XXXIX and the refusal to give the instructions quoted in Errors XL and XLI, all of which deal with the theory of derivative liability and supporting the principle that an employer can in no event be held in damages in excess of that of the employee, has been considered in the preceeding subdivision of this brief.

Appellant complains of the court's refusal to give its requested instructions Nos. 23 and 24, being set out in full in errors numbered XLII and XLIII. These requested instructions deal particularly with contributory negligence and the assumption of risk by Avenell Newby. When appellees amended their complaint and injected the theory of drunkeness into the case, they necessarily opened up the argument that if Hair was drunk, Avenell Newby knew it and, by riding with him and joining him in drinking, accepted the same responsibility which rested upon him. In French v. Tebben, 53 Ida. 701, 27 P. 2d 475, this precise matter is dealt with; at page 710 the Idaho Court says:

> "We concede that there is ample evidence in the record from which it could have logically been found by the jury that Mrs. Tebben was under the influence of liquor at the time they entered the car to start home and at the time of the accident; that Mrs. French knew or should have known such facts; also that Mrs. French purchased the liquor which caused such intoxication, and that such intoxication contributed to the proximate cause of the injury. If Mrs. Tebben was intoxicated at the time and such intoxication was one of the proximate causes of the injury, and Mrs. French furnished the liquor to cause such intoxication, or knowingly was willing to ride with her while she was under the influence of liquor, then Mrs. French was guilty of contributory negligence. * * * The court properly instructed the jury in this regard, * * *."

If Hair was under the influence of intoxicating liquor, as urged by the appellees, Mrs. Newby knew it. She had been with him constantly for 18 hours. She too had been drinking. The evidence is silent as to who paid for the liquor, but that is immaterial. Appellees having thus injected this matter into the case and appellant having pleaded these defenses, it was certainly entitled, under the evidence, to these instructions.

IX.

A NEW TRIAL SHOULD HAVE BEEN GRANTED
(ERROR XLIV)

Appellant moved for a new trial in addition to its motion for judgment notwithstanding the verdict (R.69-96). The motion was denied (R.100-101). The appeal was from the judgment and the order denying a new trial (R.101). The court's ruling on this point is assigned as error (No. XLIV). The grounds are set out fully in the motion.

It is recognized that ordinarily a denial of motion for a new trial is not reviewable except where there has been an abuse of discretion. It is contended in this case that such an abuse is apparent for the reasons heretofore argued in this brief. In addition, appellant urges that under the facts and circumstances disclosed, the verdict was grossly excessive. This question is reviewable. In Department of Water and Power v. Anderson, (C.C.A. 9th) 95 F. 2d 577, at 586, it is stated:

> "Appellant also contends that the verdict was excessive. Although it was held in Southern Ry. Co. v. Montgomery, 5 Cir., 46 F. 2d 990, 991, that a Circuit Court of Appeals has 'no jurisdiction to correct a verdict because it is excessive,' the rule in this court is that the refusal to grant a new trial is 'such an abuse of discretion as is reviewable by this court' where the verdict is 'grossly excessive.' Cobb v. Lepisto, 9 Cir., 6 F. 2d 128, 129. See, also, W. T. Rawleigh Co. v. Shoultz, 3 Cir. 56 F. 2d 148. Compare Louisville & Nash. R. Co. v. Holloway, 246 U.S. 525, 529, 38 S. Ct. 379, 62 L. Ed. 867; Fairmount Glass Works v. Coal Co., 287 U.S. 474, 481, 485, 53 S. Ct. 252, 254, 77 L. Ed. 439."

In the case of Cobb v. Lepisto, 6 F. 2d 128, cited in the foregoing quotation, the court granted a new trial because the verdict was excessive. In the case at bar a verdict of $30,000 was awarded against appellant, a corporate defendant. No verdict was returned against the defendant Donnelly. $7,500 was the amount of damages previously awarded against Hair, the active tort-feasor. This award was for the death of a woman who had left her home and children, sought the

companionship of another man, and engaged with him in questionable conduct for a period of approximately 18 hours. While this unfortunate adventure naturally provokes a sympathetic forgiveness yet it cannot help but reflect upon her value to her husband and children.

Furthermore, consideration must be given to the peculiar circumstances attendant upon the trial of the case. Mr. Newby came into court in the uniform of the United States Navy at the time of the war with Japan (R.173). Newspaper reports played the matter up in the daily press, to which the jurors had access. Such headlines as "Machinist Flys from Saipan for $100,000 Suit Retrial" R. 90), and the details of such trip were printed. Likewise, the Myers incident appeared frequently in the papers. One of the jurors had a newspaper in her hands as she sat in the jury box (R.94). In Myers v. Cadwalader (C.C. Pa.) 49 F. 32, in the syllabus it is said:

> "Where, during a trial extending over several days, the jury separating after each daily session, leading newspapers in the city in which the trial was taking place published matter calculated to prejudice the jury against one of the parties, it will be presumed that the jury saw the matter published."

The ruling of the court was founded in the following:

> "* * * it is incredible that, going out into the community they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss

> it. Good ground, therefore, here appears for setting aside the verdict."

See also McKiblen v. Philadedphia & R. Ry., (C.C.A. 3d) 251 F. 577.

The newspaper items are, of course, only one ground which appellant urges actuated the jury. It is necessary that the court review and consider the entire record, including war hysteria; a sailor in naval uniform trying a case, founded in claimed negligence, against a large corporation; the large amount of evidence introduced concerning the details of the Myers incident and opinions of policemen, all of which it is contended, was improperly admitted; comparison of the verdict rendered with that rendered at the conclusion of the first trial when the inflaming circumstances referred to were not present; the fact that Donnelly, who was Hair's immediate supervising employer, was absolved from all blame and liability by the jury; the various errors committed by the trial court in admission of evidence and instructions to the jury and refusal to give other instructions heretofore argued in this brief. All of the circumstances alluded to are compelling in the conclusion that the jury was improperly influenced, the verdict is excessive and appellant did not have a fair trial and, that the trial court abused its discretion in refusing to grant a new trial.

X.

CONCLUSION

In conclusion, appellant respectfully contends that the

trial court erred in each and all of the particulars hereinbefore recited and referred to and that the judgment against appellant should be reversed with instructions to dismiss said cause against appellant.

Respectfully submitted,

E. B. SMITH

Residence and Post Office Address:
Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residence and Post Office Address:
Pocatello, Idaho

APPENDIX "1"

Section 48-901 Idaho Code Annotated As Amended by Chapter 160 of the 1939 Session Laws

48-901. LIABILITY OF MOTOR OWNER TO GUEST. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his * * * *intoxication* or his reckless disregard of the rights of others.

APPENDIX "2"

Plaintiffs' Exhibit A

A part of deposition of E. A. Darr and being a portion of a civil complaint.

(R.354-355, 357)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

BERTHA MEYERS; JACOB D. MYERS, MARY HOLLY; HENRY MYERS; IDA WOODS; BERTHA PIEPER; EVELYN MEYERS HANSON; LEONA WEIAND; GEORGE MEYERS; ROBERT MEYERS and MELBA DUNN,

Plaintiffs,

vs.

R. J. REYNOLDS TOBACCO COMPANY; L. R. DONNELLY and RULON D. HAIR,

Defendants.

} COMPLAINT

* * * *

V.

That at all times hereinafter mentioned and particularly on the 15th day of April, 1939, between the hours of four and five o'clock in the morning of said day, the defendant Rulon

D. Hair was an agent, servant and employee of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly; that in connection with the employment of said defendant Rulon D. Hair as such employee of the defendant L. R. Donnelly and R. J. Reynolds Tobacco Company, it was part of the duties of the defendant Rulon D. Hair to operate and drive a certain motor vehicle, or truck, which said truck was a Chevrolet job delivery truck, and bearing Bannock County, Idaho, license Number 3A-41; that it was at all times hereinafter mentioned and particularly on the 15th day of April, 1939, at the hour of between four and five o'clock in the morning of said day, it was the duty of said defendant, Rulon D. Hair as such agent, servant or employee of the defendants L. R. Donnelly and R. J. Reynolds Tobacco Company, to haul, transport and have in his possession in said motor vehicle a stock or quantity of goods consisting of cigars, cigarettes, and tobaccos produced and manufactured by the defendant R. J. Reynolds Tobacco Company, and for sale by the defendant R. J. Reynolds Tobacco Company and L. R. Donnelly, through and by the defendant Rulon D. Hair, it being the duty of said Rulon D. Hair to drive and operate said truck and to haul said stock of tobaccos, cigarettes, etc., in said truck from place to place in Bannock County, Idaho, and in other counties throughout the southeastern portion of Idaho, said Bannock County, and other counties throughout the southeastern portion of Idaho being the territory allotted to the defendant, Rulon D. Hair by the defendant L. R. Donnelly, and R. J. Reynolds Tobacco Company within which to solicit orders and canvass the trade generally; that it was further a part of said defendant Hair's duty, as an em-

ployee of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, to post and distribute advertising materials and matters, advertising the goods, wares, and merchandise manufactured by said Tobacco Company and for sale by said defendant Donnelly and R. J. Reynolds Tobacco Company; * * *.

* * * *

WHEREFORE, plaintiffs pray judgment against the defendants and each of them for damages, and for costs of suit and general relief.

ANDERSON, BOWEN & ANDERSON,

Attorneys for plaintiffs.
Residence, Pocatello, Idaho.

Verified by Jacob D. Myers as one of the plaintiffs, before Clyde Bowen, Notary Public for Idaho, on June 14, 1939.

Summons issued June 14, 1939.

APPENDIX "3"

Plaintiffs' Exhibit No. 24

(R.348-351)

Prosecuting Attorneys Information.

Examination Held.

In the District Court of the Fifth Judicial District of the State of Idaho, within and for the County of Bannock

STATE OF IDAHO,

Plaintiff,

vs.

RULON D. HAIR,

Defendant.

PROSECUTING ATTORNEY'S INFORMATION

C. M. Jeffery, Prosecuting Attorney in and for Bannock County, State of Idaho, who, in the name and by the authority of said State prosecutes in its behalf, in proper person comes into said District Court in the County of Bannock, State of Idaho on the 19th day of May, 1939, and gives the Court to understand and be informed that Rulon D. Hair is accused by this information of the crime of Involuntary Manslaughter which said crime was committed as follows, to-wit: That the said Rulon D. Hair on or about the 15th day of April, 1939, and before the filing of this information at Pocatello in the County of Bannock, State of Idaho, then and

there being, did then and there knowingly, willfully, unlawfully and feloniously drive and operate a motor vehicle upon a public highway, to-wit: The streets of Pocatello, State of Idaho, and particularly on East Center Street, at a point in the three hundred block of said street, carelessly and heedlessly in wilful and wanton disregard of the right and safety of others, without due caution and circumspection, and at a speed and in a manner so as to endanger and likely to endanger any person thereon, and at said time and place did then and there drive and operate a motor vehicle as aforesaid while under the influence of intoxicating liquor, and that by reason of the acts afore-alleged, the automobile driven by the defendant, as aforesaid, without malice, did strike one Jacob Myers, a human being, thereby inflicting upon the said Jacob Meyers mortal wounds from the effect of which he, the said Jacob Meyers, died.

All of which is contrary to the form, force and effect of the statute in such case in said State made and provided and against the peace and dignity of the State of Idaho.

That the said Rulon D. Hair on the 20th day of April, 1939, was brought before a committing Magistrate, to-wit: The Honorable William Hinckley, Justice of Peace, Pocatello Precinct, Bannock County, State of Idaho, to be examined on the aforesaid charge, according to law: and was then and there by the said Magistrate advised of his statutory rights in the premises.

Thereupon, the said Rulon D. Hair was by the said Magistrate in open Court duly examined on the aforesaid charge according to law, and was then and there by the said Magistrate held to answer said charge in the District Court of the

Fifth Judicial District, State of Idaho, within and for the County of Bannock.

C. M. JEFFERY

Prosecuting Attorney, Bannock County, Idaho.

State of Idaho, County of Bannock — ss.

I, Anna Keefe, Clerk of the District Court of the Fifth Judicial District, in and for the County of Bannock, State of Idaho, do hereby certify that the foregoing is a true and correct copy of the original information filed in my office on the 19th day of May, 1939.

In Testimony Whereof, I have hereunto set my hand and official seal this, the 19th day of May, 1939.

Clerk.

Deputy.

Names of Witnesses known to Prosecuting Attorney at the time of the filing of this Information: Dr. H. H. Hughart, Ray Swallow, Don Robinson, F. H. Smullen, Arthur P. Hall, Y. D. Black, L. F. McKinnon, Robert M. Pugmire, A. R. Decker, Lee Bellah, Guy Nelson, Beth Robbins, Gretta Chambers, Anna Keefe, Art Olson, Edna Locke, L. W. Cox, Tom Rush, A. L. Oliver.

Filed in open District Court and made a record of said Court this 22 day of May, 1939.

C. M. JEFFERY, Prosecuting Atty.

ANNA KEEFE, Clerk.

(Title of State District Court and Cause.)

VERDICT

We, the Jury in the above entitled cause, find defendant guilty as charged in the information and we the Jurors recommend all leniency possible.

J. P. JENSEN, Foreman.

(Endorsed) : Filed Dec. 3, 1939.

(Title of State District Court and Cause.) B 1591

Register No. B 1591

CERTIFICATE

I, Anna Keefe, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, hereby certify that the original files in the above entitled cause are on file in my office; that I have custody and control of the same and that the same are official records of the Fifth Judicial District of the State of Idaho, in and for Bannock County;

That the above and foregoing Prosecuting Attorney's information and verdict are true and correct copies of the originals on file in my office and that the verdict rendered is the verdict rendered upon the trial of the defendant, Rulon D. Hair, upon the charges set out in the Prosecuting Attorneys Information.

Dated this 16th day of March, 1945.

(Seal) (Sgd.) ANNA KEEFE, Clerk.